# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 1392

SOUTHWESTERN PORTLAND CEMENT COMPANY,
PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. 12-22) is reported at 407 F. 2d 131. The Board's decision and order in the unfair labor practice case (R. 134-143, 160-161)[1] are reported at 169 NLRB No. 39. The

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[1] "R." refers to the Transcript of Record filed in the court below. "S.R." refers to the Supplemental Record, also filed below.

underlying decisions in the representation proceedings (R. 51-60, 97-99) are not officially reported.

## JURISDICTION

The judgment of the court of appeals was entered on March 3, 1969 (Pet. 22-23), and the Company's petition for rehearing was denied on April 7, 1969 (Pet. 24). The petition for a writ of certiorari was filed on May 14, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the court of appeals properly concluded that the employer was not prejudiced by the omission from the record before the Board of affidavits which he had submitted in support of his objections to a representation election.

2. Whether the Board properly refused to permit the employer to relitigate in an unfair labor practice proceeding issues which had previously been determined in a related representation proceeding.

## STATEMENT

The Company filed timely objections to a Board representation election conducted among its Odessa, Texas, employees following the victory of the United Cement, Lime, and Gypsum Workers International Union, AFL-CIO, Local 476. Specifically, the Company alleged that the Union had made a fair election impossible by posting at the plant, on the day of the election, a telegram which materially misrepresented

the Union's dues structure and the volume of its arbitration cases (R. 52-54). In accordance with Section 102.69(c) of the Board's Rules and Regulations (29 C.F.R. Sec. 102.69(c)), the Regional Director undertook an administrative investigation of the Company's objections, and requested the parties to present relevant evidence. The Company submitted the affidavits of several Company officials and employees, and the Union submitted the affidavit of the organizer in charge of the Odessa campaign (S.R. 13-20). Upon consideration of these affidavits, the Regional Director issued a Report on Objections in which he found that the telegram in question contained no material misrepresentations of fact, and recommended that the Company's objections be overruled (R. 53-58).

The Regional Director forwarded his report to the Board, together with the Company's objections, but retained in his files the affidavits submitted during the investigation (Pet. 14). The Company's exceptions to the Report on Objections, however, set forth the substance of the affidavits and also presented additional documentary evidence (R. 61-78). After reviewing the Regional Director's report, the Company's exceptions, and the attached documentary evidence, the Board found that the exceptions raised no substantial or material issues of fact or law which would warrant reversing the Regional Director's findings and recommendations (R. 99). Accordingly, the Board adopted those findings and recommendations, and certified the Union (R. 98-99).

Thereafter, the Company refused the Union's request to bargain, the Union filed unfair labor practice

charges, and a complaint was issued alleging that the refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (R. 79, 84, 89-90). In its answer, the Company admitted most of the allegations of the complaint, but challenged the certification on the ground that it was improperly denied a hearing on its objections (R. 91-93). The Board's General Counsel then moved for summary judgment, and, after consideration of the Company's opposition, the Trial Examiner granted the motion. He concluded that, since the Company offered no newly discovered or previously unavailable evidence concerning the certification, no new proceedings were necessary (R. 137-138). Accordingly, he held that the Company had violated the Act as charged; the Board affirmed the Examiner's decision and ordered the Company to bargain, upon request, with the Union (R. 160-161).

The court of appeals enforced the Board's order. It agreed that the assertions in the Union's telegram did not impair the validity of the election (Pet. 16-18), and held that, although the affidavits submitted by the Company to the Regional Director in support of its objections "should have been forwarded to the Board as part of the record in this case," the failure to do so was not prejudicial since "the Company's exceptions before the Board incorporated the contents of the affidavits and the contents of the telegram" (Pet. 19). Finally, the court held that the Company was entitled neither to an evidentiary hearing on its objections, since no material issues of fact were raised, nor to relitigate in the unfair labor practice case issues that

had been fully litigated in the representation case (Pet. 19-22).

## ARGUMENT

1. The principal issue raised in the Company's petition—whether the Board erred in ruling on the Company's objections without considering its supporting affidavits—is not an issue in this case. The court of appeals agreed with the Company that the affidavits should have been included in the record before the Board, but ruled that this "was not harmful error in the case at hand as the Company's exceptions before the Board incorporated the contents of the affidavits and the contents of the telegram" (Pet. 19). This ruling was clearly correct. The Company had submitted six affidavits (S.R. 14-20). One, that of the Company's industrial relations director, asserted that the objected-to telegram misrepresented the amount of dues another local of the Union charged the Company's plant in Victorville, California, and the number and disposition of arbitration cases at that plant (S.R. 14-15). These same contentions were developed in detail in the Company's exceptions to the Regional Director's report (R. 64-73). The remaining affidavits consisted merely of statements by Company officials and employees to the effect that they had read the Union's telegram and that in their opinion, it had had an effect on the outcome of the election (R. 16-20). Since the affidavits contained nothing of substance which was not otherwise presented to the Board, their exclusion from the representation case record was not a denial of due process. "The Constitution pro-

tects procedural regularity not as an end in itself, but as a means of defending substantive interests." *Fay* v. *Douds*, 172 F. 2d 720, 725 (C.A. 2, 1949).

2. The court's endorsement of the Board's refusal to allow relitigation of the Company's objections to the election in the unfair labor practice proceeding was also correct. It is well settled that, in the absence of newly discovered or previously unavailable evidence, the Board need not permit relitigation in a subsequent unfair labor practice proceeding of issues which have been previously determined in a related representation proceeding. *Tennessee Packers, Inc.* v. *National Labor Relations Board*, 379 F. 2d 172, 179 (C.A. 6), certiorari denied, 389 U.S. 958; *National Labor Relations Board* v. *Sun Drug Co.*, 359 F. 2d 408, 414-416 (C.A. 3); *Neuhoff Brothers, Packers, Inc.* v. *National Labor Relations Board*, 362 F. 2d 611, 613 (C.A. 5), certiorari denied, 386 U.S. 956; *Macomb Pottery Co.* v. *National Labor Relations Board*, 376 F. 2d 450, 452 (C.A. 7). "The unit proceeding and [the] complaint on unfair labor practices are really one." *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 158; see also *id.*, at 161-162.[2] Although the Company requested the

[2] *Amalgamated Clothing Workers* v. *National Labor Relations Board*, 365 F. 2d 898 (C.A.D.C.), does not conflict with these settled principles. There the court expressly recognized the validity of the Board's rule precluding relitigation where, as here, the employer seeks to justify a refusal to bargain on the ground that an earlier Board certification of representative is invalid. The court held only that where "the part of the charge involved in the relitigation issue is not refusal to bargain, but rather interference with rights of organiza-

Board to consider an additional affidavit in the unfair labor practice proceeding, it did not even assert that this document contained any newly discovered or previously unavailable evidence (R. 109-128).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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tion, the [representation and unfair labor practice] proceedings are not so related as to foreclose presentation to the Board of the underlying issues." *Id.* at 905. See *Niederriter Co.*, 130 NLRB 113.

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